ESTTA Tracking number: **ESTTA472053**

Filing date: **05/11/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| | |
|---|---|
| Proceeding | 91200436 |
| Party | Plaintiff<br>CardioMEMS, Inc. |
| Correspondence Address | OLIVIA MARIA BARATTA<br>KILPATRICK TOWNSEND & STOCKTON LLP<br>1100 PEACHTREE STREET NE , SUITE 2800<br>ATLANTA, GA 30309<br>UNITED STATES<br>tmadmin@kilpatricktownsend.com, mbaratta@kilpatricktownsend.com, vnorthcutt@kilpatricktownsend.com |
| Submission | Opposition/Response to Motion |
| Filer's Name | Olivia Maria Baratta |
| Filer's e-mail | mbaratta@ktslaw.com, jfarris@ktslaw.com, kteilhaber@ktslaw.com, tmadmin@ktslaw.com, tlord@ktslaw.com |
| Signature | /Olivia Maria Baratta/ |
| Date | 05/11/2012 |
| Attachments | 2012.05.11 Opposer's Opposition to Applicant's Motion for Leave to File an Amended Answer.pdf ( 25 pages )(411666 bytes ) |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| | | |
|---|---|---|
| CARDIOMEMS, INC., | ) | |
| | ) | In re Serial No. 85/082098 |
| Opposer, | ) | |
| | ) | Mark: CHAMPIONIR |
| v. | ) | |
| | ) | Opposition No. 91200436 |
| MEDINOL LTD., | ) | |
| | ) | |
| Applicant. | ) | |

**OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR LEAVE TO FILE AN AMENDED ANSWER**

Opposer CardioMEMS, Inc. ("Opposer") hereby opposes the Motion for Leave to File an Amended Answer filed by Applicant Medinol Ltd. ("Applicant").

## INTRODUCTION

Applicant seeks leave to amend its answer to assert a counterclaim for cancellation of Opposer's CHAMPION trademark registration (Reg. No. 4029193) ("Opposer's Registration"). In support of its motion to amend, Applicant relies on two post-answer events that have no bearing on the issues in this case or on Applicant's proposed counterclaims: (1) the United States Patent and Trademark Office's ("USPTO") January 2012 amendment to the U.S. Acceptable Identification of Goods and Services Manual ("ID Manual"); and (2) the non-binding advisory opinion issued by a U.S. Food and Drug Administration ("FDA") advisory committee on December 8, 2011 related to Opposer's CHAMPION brand medical devices. Neither event is recent or supportive of Applicant's proposed counterclaim. Accordingly, Applicant's motion to amend should be denied because it is untimely and its proposed counterclaims are contrary to well-settled law, and thus legally insufficient.

## RELEVANT BACKGROUND

On March 18, 2009, Opposer applied to register its CHAMPION trademark with the USPTO for, among other things, medical device goods in Class 10 and services in Class 42. Am. Notice of Opp. ("Am. Notice") at ¶ 2. On July 11, 2010, Applicant filed an intent-to-use application to register the mark CHAMPIONIR, also for Class 10 medical devices. *Id.* at ¶ 8. Due to the similarities of the marks and the respective goods, Opposer filed its Notice of Opposition against registration of Applicant's CHAMPIONIR mark on June 29, 2011. Dkt. No. 1. On August 5, 2011, before Applicant answered the Notice of Opposition, Opposer filed an Amended Notice of Opposition. Dkt. No. 4. As alleged in the Amended Notice of Opposition, Opposer first began using its CHAMPION mark in commerce in 2007 in connection with a clinical trial to evaluate the safety and effectiveness of its Class 10 medical devices. Am. Notice of Opp. ("Am. Notice") at ¶ 4.

On the same day it filed its Amended Notice of Opposition, Opposer filed with the USPTO the Statement of Use for its CHAMPION trademark application claiming a first use in commerce date for Opposer's Class 10 medical devices of at least August 5, 2011, and a first use in commerce date for Opposer's Class 42 services of at least December 2, 2008. *See* Ex. A.

On August 19, 2011, two weeks after Opposer filed both its Amended Notice of Opposition and its Statement of Use and accompanying specimens, Applicant filed its Answer to the Amended Notice of Opposition ("Amended Answer"). Dkt. No. 6. Applicant's Amended Answer asserted three affirmative defenses, one of which challenged Opposer's date of first use of its CHAMPION mark. *Id.* Notably, Applicant attached to its Amended Answer a copy of Opposer's Statement of Use filed in support of its registration of the CHAMPION mark. *Id.* at Ex. A. Opposer's Statement of Use disclosed a specimen showing use of the CHAMPION mark

on packaging and accurately described the specimen as a "shipment of [Opposer's] goods for testing showing use of the mark." On August 16, 2012, three days before Applicant filed its Amended Answer, the USPTO issued a Notice of Acceptance of [Opposer's] Statement of Use. *See* Ex. B. Opposer's CHAMPION mark subsequently registered on September 20, 2011. *See* Ex. C.

Over eight months later and with only thirty-eight days remaining in the discovery period, Applicant filed its Motion for Leave to File an Amended Answer, seeking to cancel Opposer's Registration based on "recently discovered evidence." According to Applicant, Opposer's use of the CHAMPION mark in connection with clinical trials and testing is insufficient to support registration because such use is (1) prohibited by the January 1, 2012 amendment to the ID Manual; or (2) unlawful in that it occurred without FDA approval as highlighted by the December 8, 2011 FDA advisory panel opinion. Applicant's interpretation of the amendment to the ID Manual and FDA advisory opinion are inconsistent with well-settled law holding that use in clinical trials of a mark on or in connection with a medical device constitutes use in commerce sufficient to support registration of the mark.

## ARGUMENT AND CITATION TO AUTHORITY

Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend pleadings "should [be] freely give[n] . . . when justice so requires," it is not automatic. Fed. R. Civ. P. 15(a). Rather, the Board will exercise its discretion to deny leave to amend where, among other things, "entry of the proposed amendment would be prejudicial to the rights of the adverse party or would violate settled law." *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 U.S.P.Q.2d 1540, 1541 (T.T.A.B. 2001); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave is appropriately denied in the case of "undue delay, bad faith or dilatory motive on the part of the

movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."); T.B.M.P. § 507.02 (and cases cited therein).

Applicant's motion for leave should be denied because: (1) the proposed counterclaim violates settled law and is therefore futile; and (2) Applicant knew or should have known of the alleged grounds for its proposed counterclaim long before April 26, 2012.

**A. Applicant's Proposed Counterclaim Is Futile.**

Leave to amend should be denied when the proposed counterclaim is contrary to settled law and legally insufficient, and thus cannot prevail. *Trek Bicycle*, 64 U.S.P.Q.2d at 1541 ("Where the moving party seeks to add a new claim or defense, and the proposed pleading thereof is legally insufficient, the Board normally will deny the motion for leave to amend.") (citing *Octocom Sys., Inc. v. Houston Comp. Servs., Inc.*, 918 F.2d 937, 939 (Fed. Cir. 1990); *see also Am. Express Mktg. & Dev. Corp. v. Gilad Dev. Corp.*, 94 U.S.P.Q.2d 1294, 1300 (T.T.A.B. 2010) (applicant's proposed affirmative defense was contrary to settled law and therefore denied as futile); *Media Online Inc. v. El Clasificado Inc.*, 88 U.S.P.Q.2d 1285, 1287 (T.T.A.B. 2008) (denying leave to amend where plaintiff's fraud claim, as pleaded, was legally insufficient); *Leatherwood Scopes Int'l, Inc. v. Leatherwood*, 63 U.S.P.Q.2d 1699, 1702 (T.T.A.B. 2002) (denying motion to allege laches and acquiescence as grounds for opposition because they are legally insufficient as grounds for opposition); *Phonak Holding AG v. ReSound GmbH*, 56 U.S.P.Q.2d 1057, 1059 (T.T.A.B. 2000) (motion to add cancellation counterclaim denied where allegation was insufficient to state claim); *Institut National des Appellations d'Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d 1875, 1896 (T.T.A.B. 1998) (amendment denied where opposers could not prevail on *res judicata* claim as a matter of law); *CBS Inc. v. Mercandante*, 23

U.S.P.Q.2d 1784, 1788 (T.T.A.B. 1992) (opposer's attempt to add counterclaim denied as inconsistent with notice of opposition).

**1. The USPTO's Amendment to the ID Manual Is Inconsequential.**

Applicant's reliance on the USPTO's January 1, 2012 amendment to the ID Manual is misplaced. As in initial matter, there is no evidence, policy, or rule of law that suggests that the USPTO's amendment to the ID Manual can be used as grounds to cancel an already registered mark. More importantly, Applicant conveniently omits relevant parts of the amendment, namely that it is directed to International Class 42 services, not Class 10 medical devices.

As amended, the ID Manual now provides that one acceptable identification for International Class 42 services is: "medical and scientific research, namely, conducting clinical trials ***for others***." ID Manual, available at http://tess2.uspto.gov/netahtml/manual.html (emphasis added). The amendment clarifies the USPTO's position that conducting one's own clinical trials does not constitute a ***service***; only clinical trials conducted for others can be used to support registration of the name for a clinical trial. As Applicant is well aware, Opposer's CHAMPION mark and registration is not directed to the service of conducting clinical trials. Rather, Opposer relies on use of its CHAMPION mark for medical devices that were transported in commerce in connection with clinical trials and product testing. As explained more fully below, nothing in the amendment to the ID Manual narrows Opposer's ability to rely on its use of the CHAMPION branded medical devices in a clinical trial or testing to support its claim of use in commerce.

**2. Opposer's Use of Its CHAMPION Mark for Medical Devices in Clinical Trials and Testing Is Sufficient to Support Registration.**

It is well-settled that use in commerce for purposes of acquiring rights under the Lanham Act encompasses "shipment to clinical investigators during the Federal approval process" and

"ongoing shipments of a new drug to clinical investigators by a company awaiting FDA approval." T.M.E.P. § 901.02 (citing S. Rep. No. 515, 100th Cong., 2d Sess. 44-45 (1988); H. Rep. No. 1028, 100th Cong., 2d Sess. 15 (1988)); *see also* 3 Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks, and Monopolies*, § 20:1 (4th ed. 2008) ("Pre-clinical and clinical trials qualify as commercial use for the purpose of acquiring rights in a pharmaceutical mark.").

For example, in *Endo Laboratories v. DeCosta*, 199 U.S.P.Q. 824 (T.T.A.B. 1978), the Board recognized that an applicant's delivery of medical instruments to a doctor at National Health Laboratories for use in connection with a clinical study constituted use in commerce, based on the applicant's "efforts to test the [medical device] product and to establish a viable commercial business," notwithstanding the fact that there were no sales of the medical device products. *Id.* at 829 n.14. Two years later, in *Schering Corp. v. Alza Corp.*, 207 U.S.P.Q. 504 (T.T.A.B. 1980), the Board stated with respect to applicant's medical devices that "use of a mark on goods delivered in commerce for testing or experimental purposes, but never sold," is sufficient to support an application for registration. *Id.* at 506 n.4; *see also G.D. Searle & Co. v. Nutrapharm, Inc.*, No. 98 Civ. 6890, 1999 WL 988533, at *4 (S.D.N.Y. Nov. 1, 1999) (applicant established use in commerce of its mark through interstate shipments of goods bearing the mark for clinical testing); *Alfacell Corp. v. Anticancer, Inc.*, 71 U.S.P.Q.2d 1301, 1302 (T.T.A.B. 2004) ("use in commerce" covers not only interstate shipments for clinical trials but also shipments of pharmaceuticals for pre-clinical trials and clinical trials abroad).

Importantly, the Board recently rejected the very argument that Applicant makes here in support of cancellation; namely, that shipment of medical devices for testing prior to FDA approval is not lawful commercial use in commerce and thus cannot support registration. *See*

*Automedx Inc. v. Artivent Corp.*, 95 U.S.P.Q.2d 1976, 1985 (T.T.A.B. 2010). In rejecting this argument in *Automedx,* the Board considered two questions: "(1) whether a court or government agency having competent jurisdiction under the statute involved has previously determined that party is not in compliance with the relevant statute; and (2) whether there is a *per se* violation of a statute regulating the sale of a parties goods." *Id*. at 1984 (citation omitted). As in *Automedex*, there has not been a final determination of noncompliance by a court or agency regarding Opposer's shipments of CHAMPION medical devices. Similarly, there is no *per se* violation of any statute related to Opposer's use of the CHAMPION mark for medical devices in clinical trials and testing. Indeed, Applicant cites to no statute that Opposer is alleged to have violated in shipping its CHAMPION brand medical devices for clinical trials and testing. Opposer's use of CHAMPION brand medical devices in clinical trials and testing is not only lawful, but endorsed by the Board as use sufficient to support registration of a mark.

Because the basis for Applicant's proposed counterclaim is clearly inconsistent with well-settled law, it would be futile and a waste of judicial resources for the Board even to consider it. As such, Application's motion for leave should be denied.

**3. Opposer's Statement of Use Cannot Form the Basis of a Fraud Claim.**

Surprisingly, Applicant asserts that Opposer's truthful statement to the USPTO constitutes fraud. Specifically, in paragraph six of the proposed amended counterclaim, Applicant states that:

> the alleged uses were actually based only on clinical trials sponsored by and done for the benefit of Opposer. The alleged use of the CHAMPION mark have resulted to date in a negative assessment by the United States Food and Drug Administration. It is evident therefore that Opposer could not have lawfully used the product(s) being tested in the clinical trials in interstate commerce to date.

As previously explained, Applicant's allegation that it was unlawful for Opposer to use the CHAMPION mark prior to FDA approval is fatally flawed. Accordingly, Opposer's truthful

representations to the Board about the nature of its use of the CHAMPION mark at the time it filed the Statement of Use in support of its registration cannot constitute fraud. *See Paris Glove of Canada, Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856 (TTAB 2007) (the adequacy of a specimen of use does not bear on the issue of fraud.)

**B. Applicant's Motion to Amend is Untimely**

Notwithstanding the lack of merit of the underlying counterclaim, Applicant's motion is untimely and based on information that it either knew or, after reasonable inquiry, should have known at least as early as September 20, 2011—the date on which the CHAMPION mark was registered. *See* T.B.M.P. § 507.02(a) ("A long and unexplained delay in filing a motion to amend a pleading (when there is no question of newly discovered evidence) may render the amendment untimely."); *see also Black & Decker Corp. v. Emerson Elec. Co.*, 84 U.S.P.Q.2d 1482, 1487 (T.T.A.B. 2007) (denying leave to amend where movant unduly delayed in filing its motion); *Media Online Inc. v. El Clasificado Inc.*, 88 U.S.P.Q.2d 1285, 1286 (T.T.A.B. 2006) (leave denied where petitioner unduly delayed in adding claims based on facts within petitioner's knowledge at the time the petition to cancel was filed); *Int'l Finance Corp. v. Bravo Co.*, 64 U.S.P.Q.2d 1597, 1604 (T.T.A.B. 2002) (motion denied where, although discovery was still open, movant failed to explain two-year delay in seeking to add new claim); *Trek Bicycle*, 64 U.S.P.Q.2d at 1541 ("A motion for leave to amend should be filed as soon as any ground for such amendment becomes apparent.").

Applicant has always questioned Opposer's use of the CHAMPION mark. *See* Dkt. No. 6. In fact, its affirmative defenses alleged that Opposer did not use its mark in commerce in connection with the goods identified in the application. *Id.* Applicant even attached to its Amended Answer a copy of the Statement of Use that Opposer filed in support of the

CHAMPION mark registration. *Id*. at Ex. A. In that Statement of Use, Opposer described the specimen it submitted as "shipment of [Opposer's] goods for testing showing use of the mark."

Despite its early allegations that Opposer had not used the CHAMPION mark in commerce as outlined in the Statement of Use, Applicant waited until the day it filed its motion to amend to serve discovery upon Opposer. Without question, Applicant could have learned earlier that Opposer had not yet received FDA approval of the medical device identified in the CHAMPION application as of August 5, 2011, the date on which it filed its Statement of Use. *See Kellogg Co. v. Shakespeare Co., LLC*, Opp. No. 91154502, 2005 WL 1581551, at *2 (T.T.A.B. Jun. 30, 2005) (denying opposer's motion for leave to amend notice of opposition where "[o]pposer offers no explanation of sufficient justification as to why it failed to raise these claims at the time of filing the notice of opposition when opposer had in its possession sufficient facts to allege such claims and/or through reasonable effort could have know of these claims"). Curiously, Applicant never affirmatively states that it did not know that Opposer did not have FDA approval for its CHAMPION medical devices. Rather, Applicant merely states that the December 8, 2011 FDA advisory committee decision—"**highlights** the fact that [Opposer] has not received FDA approval to market [its Class 10 goods]." Applicant's Mot. Leave at 8 (emphasis added).

Applicant should not be permitted to add futile counterclaims thirty-eight days before the close of discovery when it knew or, after reasonable inquiry, should have known the basis for the claims well in advance of the close of discovery. As it stands currently, the discovery period may close before the Board issues an order on Applicant's motion for leave to amend its Amended Answer. The Board should not reward Applicant's undue delay in attempting to add counterclaims.

## CONCLUSION

For the foregoing reasons, Applicant respectfully submits that Applicant's Motion for Leave to File an Amended Answer should be denied.

This the 11th day of May, 2012

Olivia Maria Baratta
James W. Faris
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street, NE
Suite 2800
Atlanta, Georgia 30309-4530
(404) 815-6500

Attorneys for Opposer

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| | | |
|---|---|---|
| CARDIOMEMS, INC., | ) | |
| | ) | In re Serial No. 85/082098 |
| Opposer, | ) | |
| | ) | Mark: CHAMPIONIR |
| v. | ) | |
| | ) | Opposition No. 91200436 |
| MEDINOL LTD., | ) | |
| | ) | |
| Applicant. | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I served the attached document via e-mail, as agreed by the parties, to Applicant's counsel of record:

John P. Halski
Cadwalader, Wickersham & Taft LLP
One World Financial Center 20th Floor
New York, New York 10281
John.Halski@cwt.com

This the 11th day of May, 2012.

Olivia Maria Baratta
James W. Faris
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street, NE
Suite 2800
Atlanta, Georgia 30309-4530
(404) 815-6500

Attorneys for Opposer

# EXHIBIT A

PTO Form 1553 (Rev 9/2005)
OMB No. 0651-0054 (Exp. 09/30/2011)

# Trademark/Service Mark Statement of Use (15 U.S.C. Section 1051(d))

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**The table below presents the data as entered.**

| Input Field | Entered |
|---|---|
| **SERIAL NUMBER** | 77693458 |
| **LAW OFFICE ASSIGNED** | LAW OFFICE 102 |
| **EXTENSION OF USE** | NO |
| **MARK SECTION** | |
| **MARK** | CHAMPION |
| **OWNER SECTION (no change)** | |
| **GOODS AND/OR SERVICES SECTION** | |
| **INTERNATIONAL CLASS** | 010 |
| **CURRENT IDENTIFICATION** | Medical diagnostic sensors for measuring properties of the body, namely, pressure, corresponding catheter-based delivery apparatus to deliver sensors to locations within the body; telemetry devices for medical application and software to interrogate, receive, process and display pressure data or derived quantities for viewing and printing sold as a unit |
| **GOODS OR SERVICES** | KEEP ALL LISTED |
| **FIRST USE ANYWHERE DATE** | 09/13/2007 |
| **FIRST USE IN COMMERCE DATE** | 08/05/2011 |
| **SPECIMEN FILE NAME(S)** | \\TICRS\EXPORT11\IMAGEOUT 11\776\934\77693458\xml7\SOU0002.JPG |
| **SPECIMEN DESCRIPTION** | Shipment of Applicant's goods for testing showing use of the mark. |
| **INTERNATIONAL CLASS** | 042 |

| | |
|---|---|
| **CURRENT IDENTIFICATION** | Providing a web site that enables users to upload and access health and medical data |
| **GOODS OR SERVICES** | KEEP ALL LISTED |
| **FIRST USE ANYWHERE DATE** | 09/13/2007 |
| **FIRST USE IN COMMERCE DATE** | 12/02/2008 |
| **SPECIMEN FILE NAME(S)** | |
| **ORIGINAL PDF FILE** | SPN1-12141226-153746592_._CHAMPION_Class_42_second_screen.pdf |
| **CONVERTED PDF FILE(S) (1 page)** | \\TICRS\EXPORT11\IMAGEOUT11\776\934\77693458\xml7\SOU0003.JPG |
| **SPECIMEN DESCRIPTION** | Screen shot from website. |
| **REQUEST TO DIVIDE** | NO |
| **PAYMENT SECTION** | |
| **NUMBER OF CLASSES IN USE** | 2 |
| **SUBTOTAL AMOUNT [ALLEGATION OF USE FEE]** | 200 |
| **TOTAL AMOUNT** | 200 |
| **SIGNATURE SECTION** | |
| **DECLARATION SIGNATURE** | /David Stern/ |
| **SIGNATORY'S NAME** | David Stern |
| **SIGNATORY'S POSITION** | Senior Vice President |
| **DATE SIGNED** | 08/05/2011 |
| **FILING INFORMATION** | |
| **SUBMIT DATE** | Fri Aug 05 16:06:39 EDT 2011 |
| **TEAS STAMP** | USPTO/SOU-12.1.41.226-20110805160639587199-76934558-48055bc9d3ca43c83135784 |

| | |
|---|---|
| | 494f6c93a5d-CC-2379-20110<br>805153746592032 |

PTO Form 1553 (Rev 9/2005)
OMB No. 0651-0054 (Exp. 09/30/2011)

# Trademark/Service Mark Statement of Use
# (15 U.S.C. Section 1051(d))

To the Commissioner for Trademarks:

**MARK:** CHAMPION
**SERIAL NUMBER:** 77693458

The applicant, CardioMEMS, Inc., having an address of
387 Technology Circle, N.W., Suite 500
Atlanta, Georgia 30313
United States
is submitting the following allegation of use information:

For International Class 010:
Current identification: Medical diagnostic sensors for measuring properties of the body, namely, pressure, corresponding catheter-based delivery apparatus to deliver sensors to locations within the body; telemetry devices for medical application and software to interrogate, receive, process and display pressure data or derived quantities for viewing and printing sold as a unit

The mark is in use in commerce on or in connection with all goods or services listed in the application or Notice of Allowance or as subsequently modified for this specific class

The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 09/13/2007, and first used in commerce at least as early as 08/05/2011, and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) Shipment of Applicant's goods for testing showing use of the mark..
Specimen File1

For International Class 042:
Current identification: Providing a web site that enables users to upload and access health and medical data

The mark is in use in commerce on or in connection with all goods or services listed in the application or Notice of Allowance or as subsequently modified for this specific class

The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 09/13/2007, and first used in commerce at least as early as 12/02/2008, and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) Screen shot from website..

**Original PDF file:**
SPN1-12141226-153746592_._CHAMPION_Class_42_second_screen.pdf
**Converted PDF file(s)** (1 page)
Specimen File1

The applicant is not filing a Request to Divide with this Allegation of Use form.

A fee payment in the amount of $200 will be submitted with the form, representing payment for the allegation of use for 2 classes.

**Declaration**

Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq., as amended). Applicant is the owner of the mark sought to be registered, and is using the mark in commerce on or in connection with the goods/services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce.

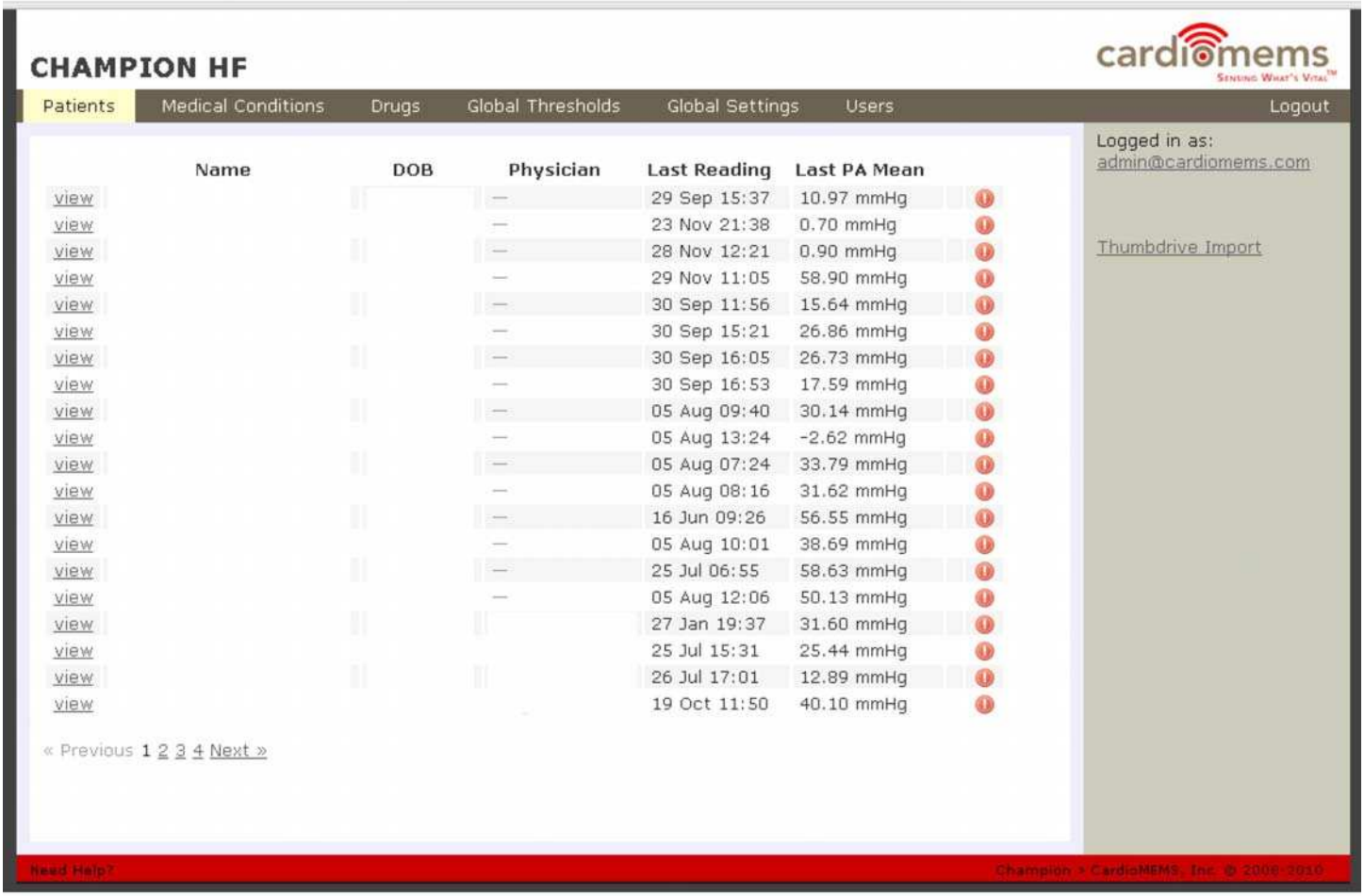
The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the form or any resulting registration, declares that he/she is properly authorized to execute this form on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /David Stern/ Date Signed: 08/05/2011
Signatory's Name: David Stern
Signatory's Position: Senior Vice President

RAM Sale Number: 2379
RAM Accounting Date: 08/08/2011

Serial Number: 77693458
Internet Transmission Date: Fri Aug 05 16:06:39 EDT 2011
TEAS Stamp: USPTO/SOU-12.1.41.226-201108051606395871
99-77693458-48055bc9d3ca43c8315784494f6
c93a5d-CC-2379-20110805153746592032


CHAMPION
HF Monitoring System
REF
SN
Use by


CHAMPION HF
cardiomems
Sensing What's Vital™
Patients
Medical Conditions
Drugs
Global Thresholds
Global Settings
Users
Logout
Logged in as:
admin@cardiomems.com
Thumbdrive Import
Name
DOB
Physician
Last Reading
Last PA Mean
view — 29 Sep 15:37 10.97 mmHg
view — 23 Nov 21:38 0.70 mmHg
view — 28 Nov 12:21 0.90 mmHg
view — 29 Nov 11:05 58.90 mmHg
view — 30 Sep 11:56 15.64 mmHg
view — 30 Sep 15:21 26.86 mmHg
view — 30 Sep 16:05 26.73 mmHg
view — 30 Sep 16:53 17.59 mmHg
view — 05 Aug 09:40 30.14 mmHg
view — 05 Aug 13:24 -2.62 mmHg
view — 05 Aug 07:24 33.79 mmHg
view — 05 Aug 08:16 31.62 mmHg
view — 16 Jun 09:26 56.55 mmHg
view — 05 Aug 10:01 38.69 mmHg
view — 25 Jul 06:55 58.63 mmHg
view — 05 Aug 12:06 50.13 mmHg
view 27 Jan 19:37 31.60 mmHg
view 25 Jul 15:31 25.44 mmHg
view 26 Jul 17:01 12.89 mmHg
view 19 Oct 11:50 40.10 mmHg
« Previous 1 2 3 4 Next »
Need Help?
Champion > CardioMEMS, Inc. © 2008-2010

**FEE RECORD SHEET**

**Serial Number:** 77693458

**RAM Sale Number: 2379**

**Total Fees:** $200

**RAM Accounting Date: 20110808**

| Transaction | Fee Code | Transaction Date | Fee per Class | Number of Classes | Total Fee |
|---|---|---|---|---|---|
| Statement of Use (SOU) | 7003 | 20110805 | $100 | 2 | $200 |

**Transaction Date:** 20110805

# EXHIBIT B

Side - 1

# NOTICE OF ACCEPTANCE OF SOU
**MAILING DATE: Aug 16, 2011**

The statement of use (SOU) filed for the trademark application identified below has been accepted. This acceptance means that the mark identified below is entitled to be registered. Accordingly, the registration will issue in due course barring any extraordinary circumstances.

For further information, visit our website at: http://www.uspto.gov or call the Trademark Assistance Center at 1-800-786-9199.

**SERIAL NUMBER:** **77693458**
**MARK:** **CHAMPION**
**OWNER:** **CardioMEMS, Inc.**

Side - 2

UNITED STATES PATENT AND TRADEMARK OFFICE
COMMISSIONER FOR TRADEMARKS
P.O. BOX 1451
ALEXANDRIA, VA 22313-1451

FIRST-CLASS
MAIL
U.S POSTAGE
PAID

WILLIAM H. BREWSTER
KILPATRICK STOCKTON LLP
1100 PEACHTREE ST NE STE 2800
ATLANTA, GA 30309

# EXHIBIT C

# United States of America
## United States Patent and Trademark Office

# CHAMPION

**Reg. No. 4,029,193**

**Registered Sep. 20, 2011**

**Int. Cls.: 10 and 42**

**TRADEMARK**

**SERVICE MARK**

**PRINCIPAL REGISTER**

CARDIOMEMS, INC. (DELAWARE CORPORATION)
387 TECHNOLOGY CIRCLE, N.W., SUITE 500
ATLANTA, GA 30313

FOR: MEDICAL DIAGNOSTIC SENSORS FOR MEASURING PROPERTIES OF THE BODY, NAMELY, PRESSURE, CORRESPONDING CATHETER-BASED DELIVERY APPARATUS TO DELIVER SENSORS TO LOCATIONS WITHIN THE BODY; TELEMETRY DEVICES FOR MEDICAL APPLICATION AND SOFTWARE TO INTERROGATE, RECEIVE, PROCESS AND DISPLAY PRESSURE DATA OR DERIVED QUANTITIES FOR VIEWING AND PRINTING SOLD AS A UNIT, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 9-13-2007; IN COMMERCE 8-5-2011.

FOR: PROVIDING A WEB SITE THAT ENABLES USERS TO UPLOAD AND ACCESS HEALTH AND MEDICAL DATA, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 9-13-2007; IN COMMERCE 12-2-2008.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 77-693,458, FILED 3-18-2009.

CIMMERIAN COLEMAN, EXAMINING ATTORNEY

David J. Kappos

Director of the United States Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

**Requirements in the First Ten Years***
**What and When to File:**

***First Filing Deadline:*** You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. *See* 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

***Second Filing Deadline:*** You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date.*
*See* 15 U.S.C. §1059.

**Requirements in Successive Ten-Year Periods***
**What and When to File:**

You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

**Grace Period Filings***

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.**

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. *See* 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. *See* 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

**NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at** http://www.uspto.gov.